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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 574

HAROLD N. KOCH, BESSIE KOCH, WILLIAM L. KOCH, ROSE KOCH, REBECCA KOCH ABEL, MAURICE P. KOCH and DAISY KOCH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause on September 12, 1958. (App. "E".)

OPINIONS BELOW.

Koch, et al. v. U.S.A., D.C. No. District of California (So. Div.). No opinion.

Koch, et al. v. U.S.A., ____ F. 2d ____ (1958) (App. "C"). Rehearing denied ____ F. 2d ____ (1958) (App. "D").

JURISDICTION.

Petitioners seek to have this Court review the judgment of the United States Court of Appeals for the Ninth Circuit dated September 12, 1958, (App. "C") and the Petition for Rehearing to the United States Court of Appeals for the Ninth Circuit which was denied on October 27, 1958, with the following modification of the Court's opinion; the first full sentence appearing on page 3 of the opinion which reads as follows:

> "Sebastian and Hirsch repaid the $10,000.00 loaned upon the sale of the first picture",

was stricken. (App. "D".)

On November 26, 1958, the United States Court of Appeals for the Ninth Circuit granted petitioners' application for further stay of issuance of mandate to and including December 11, 1958, to enable appellants to file their petition for certiorari.

The jurisdiction of this Court is conferred by Title 28, Section 1254, U.S.C.A.

QUESTIONS PRESENTED.

1. What is the effect of the prior extra-judicial determination by the Commissioner of Internal Revenue in the trial of tax causes?

(a) Does the same give rise to a presumption of correctness which disappears when evidence has been introduced upon all issues?

(b) Does such determination have the weight of evidence which may preponderate over all evidence adduced at the time of trial?

(c) Following the introduction of evidence upon all issues, is it proper to instruct the jury that the determination of the Commissioner of Internal Revenue may preponderate over all evidence received?

(d) Does such instruction violate the concept of due process of law?

2. May financing of motion picture productions constitute a trade or business as contemplated by the Internal Revenue Code?

3. When individuals enter into a written Partnership Agreement, specifically providing that the partnership shall engage in a particular trade or business and act thereunder over a period of years, is it proper to consider secondary evidence of the details of activities of the partnership and its members for the purpose of ascertaining whether or not the partnership is engaged in the trade or business agreed upon?

4. If, despite the written Agreement of Partnership, the activities of the partnership in question are to be considered in determining whether or not it is engaged in a particular trade or business, should all time, effort and funds expended be considered for that purpose, or should the Court and jury consider only transactions actually concluded?

5. When all phases of a trial of a cause, including reception of evidence, argument, instructions, findings of fact and conclusions of law, are predicated and determined upon an erroneous concept of law, despite appellant's objections, and when the same constitute the central theme of the case, does the failure of the appellant to specifically take exception to a particular erroneous instruction upon the subject preclude consideration of the matter on appeal?

CONSTITUTIONAL PROVISIONS INVOLVED.

U. S. Constitution—Fifth Amendment:

"No person shall be . . . nor be deprived of life, liberty or property, without due process of law;"

FEDERAL RULES INVOLVED.

Rules of Federal Procedure 51. This rule is set forth in Appendix "A".

STATUTES INVOLVED.

The statutes involved are 1939 Internal Revenue Code Section 23 and Section 122. The pertinent portions of these statutes are set forth in Appendix "A".

STATEMENT OF THE CASE.

The four petitioners executed a written Partnership Agreement in the year 1944 (Appendix "B"), wherein they agreed to . . . "engage in the business of financing motion picture productions" . . . and devoted substantial efforts to said business. Three years later, the partnership sustained a loss, admitted by the pleadings, in the sum of $90,000.00, in one of the ventures in which said sum was advanced under circumstances in which the same could only be recouped from the proceeds from the distribution of a film. The project was a total loss and petitioners contend that the loss was attributable to their "trade or business" under 1939 Internal Revenue Code, Section 23, pertaining to the deduction of losses resulting in a business regularly carried on and under 1939 Internal Revenue Code, Section 122, relating to carry-back provisions with regard to such losses.

The action was brought pursuant to provisions of U.S.C. 28, Sec. 1346 (a) (1), to recover taxes erroneously paid.

Petitioners contend that the loss was incurred in the partnership business regularly conducted pursuant to the written Partnership Agreement, and introduced the Partnership Agreement and extensive evidence re-

lating to the activities of the partnership. The Government relied upon the determination of the Commissioner of Internal Revenue that the loss resulted from a non-business bad debt and contended that the loss was a capital loss and not an ordinary business deduction.

All matters, including findings of fact and conclusions of law and judgment, were determined by the trial Court, except by stipulation, a single special interrogatory was submitted to the jury: "During the year 1947, did H. Koch & Sons regularly engage in the business of financing motion picture ventures?" (R. 293.)

Judgment was entered in favor of the United States of America in the U. S. District Court for the Northern District of California, Southern Division, on January 23, 1957. (R. 13-15.) The motion for a new trial was filed February 1, 1957 (R. 21-22), and an order denying said motion was made March 5, 1957 (R. 22), notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed on April 18, 1957 (R. 32), which Court, on September 12, 1958, affirmed the decision of the District Court in favor of the United States of America (Appendix "C"). A petition for rehearing was addressed to the United States Court of Appeals for the Ninth Circuit and said petition was denied on October 27, 1958 (Appendix "D").

REASONS FOR GRANTING THE WRIT.

I.

THE UNITED STATES COURTS OF APPEALS ARE IN CONFLICT AND AT VARIANCE WITH RESPECT TO THE EFFECT OF PRIOR DETERMINATIONS BY THE COMMISSIONER OF INTERNAL REVENUE IN THE TRIAL OF TAX CAUSES.

In the instant cause, the trial Court instructed the jury (R. 301-302) as follows:

> ". . . there is a presumption that the determination by the Commissioner of Internal Revenue that the plaintiffs were not engaged in the trade or business of financing motion picture ventures is correct. The burden is upon the plaintiff to overcome the presumption of the correctness of the Commissioner's determination by proving by a preponderance of evidence that they were engaged in the trade or business of financing motion pictures. By a preponderance of evidence is meant such evidence as when weighed with that opposed to it has more convincing force . . .".

On appeal this instruction was approved, although said Court of Appeals for the said Ninth District had ruled to the contrary in its prior decisions.[1]

The Eighth Circuit held in *Wiget v. Becker* (1936), 8th Cir., 84 Fed. 2d 706, 708:

> "A true presumption is not evidence, though it supplies its place and requires the other party

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[1] *Hemphill Schools v. Commissioner of Internal Revenue*, 137 Fed. 2d 961, C.C.A. 9 (1943);
J. M. Perry v. Commissioner, 120 Fed. 2d 123, C.C.A. 9 (1941);
San Joaquin Brick Co. v. Commissioner of Internal Revenue, 130 Fed. 2d 220, C.C.A. 9 (1942);
Lawrence v. Commissioner of Internal Revenue, 143 Fed. 2d 456, C.C.A. 9 (1944).

> to proceed with the negative. Unless he does, he loses. When he does, the presumption is out of the case, and the issue is open. Citing DelVecchio v. Bowers, 296 U.S. 280, 56 S. Ct. 190, 193, 80 L. Ed. 229."

Particularly appropriate to the instant cause is the language of that Court at page 709:

> "Brush from this case the presumption of correctness, and there remains no substantial evidence upon which the judgment can stand."

It is impossible to reconcile the views expressed by the Ninth Circuit in the instant cause, to wit: that the presumption of correctness of determinations by the Commissioner of Internal Revenue may preponderate over all of the evidence offered at the trial, with the view adopted by said Eighth Circuit in case of *E. Albrecht & Son v. Landy, Collector of Internal Revenue* (1940), 114 Fed. 2d 202, at p. 206, where the Court said:

> "But the presumption in favor of the propriety of the Commissioner's action takes flight upon the entry of proven facts."

Neither can said view be reconciled with the decisions of the Fourth Circuit, including the case of *Helvering v. Talbott's Estate,* 116 Fed. 2d 160 (1940), at p. 162:

> "When such evidence is adduced, the Commissioner's finding is no longer entitled to probative force, and the authority of the board to make the controlling decision is complete."

However, see *Crude Oil Corporation of America v. Commissioner of Internal Revenue* (1947) C.C.A. 10,

161 Fed. 809, 810, in which the Tenth Circuit holds that the presumption of correctness disappears only when evidence sufficient to sustain a contrary finding has been introduced.[2]

On the other hand, see *Howard v. United States,* C.C.A. 5 (1942), 125 Fed. 2d 986, holding that the burden of proof is only the same as prevailing at common law in actions for money had and received.

On the other hand, see *Bechelli v. Hofferbert,* D.C. M.D. (1953), 111 Fed. Sup. 631, in which it is held that the Commissioner's determination may only be overcome by a preponderance of the evidence.

See also *Frost v. United States,* D.C. La. (1947), 71 Fed. Sup. 793, affirmed 168 Fed. 2d 705, holding that the burden was upon taxpayers to prove their case by "fair *preponderance*" of the evidence.

At times Courts have held, with regard to said presumption, that the taxpayer has "the burden of proving it wrong": *E. C. Palmer and Co. v. United States,* D.C. La. (1944), 57 Fed. Sup. 233; that taxpayers have the burden of submitting "clear and convincing proof" to overcome the presumption: *Guar-*

[2]In the case of *Redfield v. Eaton* (D.C.) (1931), 53 Fed. 2d 693 (C.C.A. 2), at page 696, the Court stated:

"No one doubts that his decision is sufficient basis for the additional assessment and levy, thus casting on a plaintiff who brings the controversy into court the burden of proof upon all material allegations of the complaint. But that the Commissioner's decision, resting on evidence not presented to the court—in this case the defendant offered not a single witness—had the quality of probative evidence in determining the preponderance of evidence, is a proposition supported neither by authority nor reason."

anty v. United States, D.C. (Wash.) (1942), 44 Fed. Sup. 417, affirmed 139 Fed. 2d 69; whereas, other Courts have held that the Commissioner's determination is only prima facie correct.

The Court of Claims held in *Johnson Motor Co. v. United States,* M. 113 (1934), 6 Fed. Sup. 122, that the burden is upon the plaintiff to overcome the presumption "by the greater *weight* of the evidence".

In the case of *Duffin v. Lucas* (1932) C.C.A. 6, 55 Fed. 2d 786, 796, cert. denied 287 U.S. 611, 53 S. Ct. 14, the Court accepts several contradictory points of view. The Court first states that deficiency in the Government's proofs cannot be supplied by the Commissioner's findings. It then states that the function of the presumption is ended when it is met by proofs. It then holds that the presumption is nothing more than a procedural matter and should be confined "to the true effect of such presumptions". Finally, that Court concludes:

> ". . . if at the end the clear preponderance of proof is that the taxpayer is right and the Commissioner wrong, the initial presumption cannot balance or turn the scale; and . . . cannot serve as substantial evidence to support the trial Judge's findings."

Other cases state that the presumption must be "clearly overcome" by "weight of evidence". Some cases hold that the burden is upon the taxpayer to prove that the Commissioner was "wrong", which appears to differ from the burden which generally attends a litigant.

Petitioners objected to the Government's position at the time of trial, that petitioners had already had "one crack at this case" (R. 344-345), and the arguments to the jury that the "duly and regularly appointed executive officer of the Government, sworn to administer the Internal Revenue Laws," was correct and the inference that taxpayers were trying to evade law and order.

Trial of tax causes has been rendered unduly difficult and prolonged due to the fact that litigants have had no clear rule by which to measure the volume and extent of evidence to be offered. Tax trials are therefore attended by the introduction of a voluminous volume of testimony of intricate detail upon each and every transaction for the purpose of "make weight" evidence, far and beyond the demands of essential justice. This problem is the direct result of the uncertainty created by the divergent views concerning the effect of the "presumption of correctness".

It is imperative that this Honorable Court announce its decision clarifying the law upon this subject in order that litigants may know whether the "presumption" is a form of evidence which may preponderate over all evidence introduced at the trial, or a rule of "going forward". Does it disappear when evidence has been introduced upon all the issues of the cause or is it to be weighed against evidence opposed to it?

If this Court should afford prepondering evidentiary values to the extra judicial decisions of the Internal Revenue Department, the same will deny

due process of law to every litigant in jury trials as well as trial by Courts. Once evidence has been introduced, parties are entitled to be confronted by witnesses in appropriate Court proceedings and should not be pitted, in weighing of the evidence, against ephemeral, undefined and unexplored thoughts of government employees. A rule of law to the effect that the one sued can, by his own extra judicial determination, effect the weight of evidence to such an extent that it may preponderate over all evidence offered at trial, is certainly beyond the concept of due process of law and must be repudiated.[3]

II.

THE COURT OF APPEALS ERRONEOUSLY DETERMINED THAT FINANCING "UNDER A COMMON SENSE VIEW" CANNOT BE A TRADE OR BUSINESS.

A trade or business is that which occupies the time, attention and labor of a person for the purpose of a livelihood or profit. See *Smith v. United States,* D.C.

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[3]On a similar question this Court granted Certiorari in the case of *Commissioner of Internal Revenue v. Bain Peanut Co. of Texas* (C.C.A. 5) (1943) 134 Fed. 2d 853 (cert. granted 320 U.S. 721, 64 S. Ct. 36, 88 L. Ed. 424); however, on motion of petitioner, the cause was dismissed, 321 U.S. 800, 88 L. Ed. 1087, 64 S. Ct. 633. In that case, in considering the difference between a statute that merely supplies an inference of fact in the absence of evidence contradicting such evidence, as against a statute that creates an inference that is given the effect of evidence to be weighed against opposing testimony, the Court stated:

> "The latter presumption is unreasonable; and between private parties, violates the due process clause of the Fourteenth Amendment if created by a State statute, and the same clause of the Fifth Amendment if created by an Act of Congress."

Tenn. (1948), 85 Fed. Sup. 838, affirmed 180 Fed. 2d 357 (1950 C.A. 6).

The view expressed by the Court of Appeals in the present cause is inherently incorrect in fact as well as in law. It seems well settled that any activity may be or become a business if conducted as such.[4]

Financing is certainly no exception and has been a well recognized basic business since the beginning of known civilization. The business of "financing", whether it be motion picture productions or other fields of endeavor, is certainly something more than the mere lending of funds. The Appellate Court has construed this cause in the light of loans actually concluded, instead of permitting considerations of the continuous activities inherent in the business of financing which included constant investigation, evaluations, policing, negotiations and expenditure of substantial time necessary under the circumstances of financing the unique business of motion picture productions.

Thus the pronouncement by the Court of Appeals of the rule that financing, under a "common sense view", may not be regarded as a trade or business, has created confusion in the law.

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[4] *Giblin v. Commissioner*, 227 Fed. 2d 692, C.C.A. 5 (1955); *Commissioner v. Stokes Estate*, 200 Fed. 2d 637, C.C.A. 3 (1953); *Foss v. Commissioner*, 75 Fed. 2d 326, C.C.A. 1 (1935).

III.

WHEN INDIVIDUALS ENTER INTO A WRITTEN PARTNERSHIP AGREEMENT, SPECIFICALLY PROVIDING THAT THE PARTNERSHIP SHALL ENGAGE IN A PARTICULAR BUSINESS AND ACT THEREUNDER OVER A PERIOD OF YEARS, IT IS NOT NECESSARY OR PROPER TO CONSIDER DETAILS OF ACTIVITIES OF THE PARTNERSHIP AND ITS MEMBERS FOR THE PURPOSE OF ASCERTAINING WHETHER OR NOT THE PARTNERSHIP IS ENGAGED IN THE TRADE OR BUSINESS AGREED UPON.

In the present case, the taxpayers solemnly agreed, by a formal written agreement, to engage in the business of financing motion picture ventures three years prior to the period in question. (App. "B".) They acted thereunder prior to the time in question, during the time in question and after the time in question. The Court found (R. 8) that the agreement was at all times in full force and effect. The partnership *business* is clearly defined.

In the absence of specific agreement, Courts have considered the activity of the individual involved in order to determine the purpose and intent of the individual by evidence of time, effort and funds expended.

In the present cause, and for the first time, it is held that even though a business partnership is specifically organized and conducted for a particular business purpose, it is nevertheless not in such business. This result occurred because all previous cases, which dealt only with the unexpressed purposes of individuals, have explored activities to determine the intent or purpose of the individual, and the Court has now attached that same requirement to this case despite the fact that the

partnership articles make specific provision and the partnership has actually acted accordingly in the very transaction in question. This confusion must be clarified.

When the partnership has stipulated the nature of its business in writing and has acted accordingly, it is error to permit confusing inquiry, having less probative value and not related to the particular act or transaction in question. Thus, if persons agree formally to engage in a particular trade or business, it would appear unnecessary and improper in the absence of fraud, for the Court to look further to establish the clear intent and purpose of the partnership. We suggest that any rule which contravenes the formally expressed purpose, intent and act of a partnership and permits confusing inquiry into secondary evidence and into transactions at other times and under other circumstances should not be acceptable to this Honorable Court.

The recent tax case of *Kuhn v. U. S.* (1958), 258 Fed. 2d 840 in the 3rd Circuit held that when a contract, which shows the intent of the parties, is free from ambiguity, parol evidence to show the purpose and intent of the contracting parties is improper.

IV.

THE RULE ANNOUNCED BY THE COURT OF APPEALS THAT ONLY CONCLUDED TRANSACTIONS WILL BE CONSIDERED IN DETERMINING WHETHER OR NOT ONE IS ENGAGED IN A PARTICULAR TRADE OR BUSINESS IS IN CONFLICT WITH THE PREVAILING VIEW.

Since the trial Court did require evidence of all activities, and in view of the peculiar facts of the case and the arguments and contentions made at the time of trial, appellants requested several instructions to the effect that time and effort expended for the purpose of advancing appellants' projects should be considered by the triers of fact, and should be considered whether or not the projects were completed. The instructions were refused.

An appeal was taken for the purpose of having the rule clearly enunciated, that all activities of the partnership, including all time, all efforts and all funds expended in advancing the business should be considered in determining whether or not the partnership is engaged in a particular trade or business.

The decision of the Court of Appeals states:

> "Where appellant had made only one isolated loan at the outside, we do not think that the jury could conclude that a number of futile transactions and activities looking toward consummation of loans had any value in determining whether the partnership was engaged in the business of financing."

The Appellate Court was in error in calling the transactions loans because each advancement resulted in ownership and profit sharing. The holding was that

activities which do not result in concluded transactions are not to be considered in determining whether a taxpayer is engaged in a particular business. The decision holds that only activities relating to completed transactions may be considered in this vital determination.

In the present cause, Appellants have directed their time, efforts and funds toward the consummation of motion picture financing transactions, most of which were not concluded, and were therefore disregarded by the Court.

We find no authority for the proposition that only concluded transactions, or that only fully produced film productions, or that only efforts expended upon concluded transactions may be considered in determining whether or not one is engaged in a business. No consideration is afforded the taxpayer who has continuously devoted his time, effort, energy and substance when only one or very few transactions are successfully culminated.[5]

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[5]In the absence of agreement, apparently the determination of whether one is engaged in a business turns upon the extent of his activities in the field in question. *Daily Journal Co. v. Commissioner*, 9th Circuit, 135 Fed. 2d 687; *Miller v. Commissioner*, 9th Circuit, 102 Fed. 2d 476; *Commissioner of Internal Revenue v. Boeling*, 9th Circuit, 106 Fed. 2d 305, Certiorari denied, 308 U.S. 619, 60 S. Ct. 295, 84 L. Ed. 517; *Harvey v. Commissioner*, 9th Circuit, 171 Fed. 2d 952; *Fackler v. Commissioner*, 6th Circuit, 133 Fed. 2d 509; *Kales v. Commissioner*, 6th Circuit, 101 Fed. 2d 35; *Foss v. Commissioner*, 1st Circuit, 75 Fed. 2d 326; *Commissioner of Internal Revenue v. Stokes Estate*, 3rd Circuit, 200 Fed. 2d 637; *Campbell v. Commissioner of Internal Revenue*, 11 T. C. 510; *Henry R. Sage v. Commissioner of Internal Revenue*, 15 T. C. 299.

V.

WHERE, AFTER THE MATTER HAS BEEN ARGUED AND THE TRIAL COURT HAS NEVERTHELESS CONDUCTED THE TRIAL OF THE CAUSE WITH RESPECT TO THE CENTRAL ISSUE UPON AN ERRONEOUS THEORY OF LAW, AND WHERE THE TRIAL JUDGE PREDICATED HIS FINDINGS AND CONCLUSIONS UPON SUCH ERRONEOUS CONCEPT, THE ERRONEOUS INSTRUCTION, ALTHOUGH NOT SPECIFICALLY EXCEPTED TO, MAY BE REVIEWED BY AN APPELLATE COURT.

Although a single interrogatory was submitted to the jury (supra), all matters were in effect determined by the trial Court, which made its findings of fact and conclusions of law. The Government had no witnesses and, in fact, offered no testimony which could in any manner affect the determination of the cause. The Government relied upon the alleged presumption of correctness of the determination by the Commissioner of Internal Revenue. Thus, whether or not such determination could preponderate over the evidence adduced, became the central and all important issue in the cause and pervaded the entire trial, the determinations by the jury, findings of fact and conclusions of law, as well as argument.

The formality (Rule 51) of requesting the Court to make corrections in its instructions to the jury under the circumstances would have been nugatory and a sham. The Court's position was at all times obvious and clear upon its views on this subject.

In *Harlem Taxi Cab Association v. Nemesh* (1951) (C.A.D.C.) 191 Fed. 2d 459, 461, the Court considered erroneous instructions regarding the effect of a presumption to which no exception had been taken:

> "It would have been only a formality to ask the Court at the end of the trial to reverse itself. An error in instructing a jury may be raised by an appellate court, when justice seems to require, even though it cannot be raised by the appellant."

It is noted that other Circuits have held that Appellate Courts may consider the effect of an erroneous instruction, although not excepted to. This consideration has often been referred to as the doctrine of "plain error".[6]

We suggest that this Honorable Court has not passed upon the matters of "plain error" as effected by Rule 51 of Federal Rules of Civil Procedure, and particularly where the error complained of pervaded the entire trial and determination of the cause. There seems to be considerable question in the Courts of

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[6]See *Giacalone v. Raytheon Manufacturing Co.* (1955) 222 Fed. 2d 249 (C.C.A. 1); *Finn v. Wood* (1950) 178 Fed. 2d 583 (C.C.A. 2); *Moore v. Waring* (1952), 200 Fed. 2d 491 (C.C.A. 2).

To the same effect see *United States v. Chemell* (1957), 243 Fed. 2d 944 (C.C.A. 5).

The Eighth Circuit recognized the rule in *O'Malley v. Cover* (1955), 221 Fed. 2d 156.

The Tenth Circuit in *Allen v. Nelson Dodd Produce Co.* (1953), 207 Fed. 2d 296, 297.

See also *Montgomery v. Virginia Stage Lines* (1951), 191 Fed. 2d 770 (C.C.A.D.C.).

The Fourth Circuit considered the matter in *Hite v. Western Maryland Railway* (1954), 217 Fed. 2d 781, 782:

> "If there had been error in the instructions to the jury which in our opinion had led to a miscarriage of justice, we might notice it under our power to notice 'plain error'."

The Fifth Circuit stated in *Louisiana and Arkansas Railway Company v. Moore* (1956), 229 Fed. 2d 1:

> "However, since it goes to the central issue in the case . . . we may consider it under the general rule which allows an Appellate Court to notice plain errors, although they were not properly excepted to below."

Appeal with respect to the application of plain error to causes which are tried in whole or in part by juries, which should be finally determined by this Honorable Court.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MAX FINK,

Attorney for Petitioners.

LEON SCHILLER,

Of Counsel.

(Appendices Follow.)

Appendix "A"

Federal Rules of Civil Procedure.

Rule 51. Instructions to Jury: Objection

". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retired to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

1939 *Internal Revenue Code* Section 23.

"*Deductions from gross income.* In computing net income there shall be allowed as deductions:

"(a) Expenses

"(1) Trade or business expenses.

"(A) *In general.* All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

. . . . . .

"(e) Losses by Individuals. In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

"(1) if incurred in trade or business;

. . . . . .

"(k) Bad Debts.

"(1) General rule. Debts which become worthless within the taxable year; . . . This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection.

. . . . . .

"(4) Non-business debts. In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term 'non-business debt' means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business

. . . . . .

"(s) Net Operating Loss Deduction. For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122."

The pertinent portions of I.R.C. 122 relating to carry-back to previous taxable years of losses subsequently incurred are as follows:

"Sec. 122. Net Operating Loss Deduction.

"(a) Definition of Net Operating Loss. As used in this section, the term 'net operating loss' means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

"(b) Amount of Carry-Back and Carry-Over.

"(1) Net operating loss carry-back.

"(A) Loss for taxable year beginning before 1950. If for any taxable year beginning after December 31, 1941, and before January 1, 1950, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years. . . .

"(d) Exceptions, Additions, and Limitations. The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

. . . . . .

"(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business."

Appendix "B"

PLAINTIFFS' NO. 2—IN EVIDENCE

AMENDMENT TO AGREEMENT OF DECEMBER 31, 1941

THIS AGREEMENT entered into this 23rd day of October, 1944, by and between REBECCA KOCH, MAURICE P. KOCH, HAROLD M. KOCH AND WILLIAM L. KOCH, copartners, doing business under the fictitious firm name and style of H. KOCH & SONS, all of the City and County of San Francisco, State of California

WITNESSETH:

WHEREAS, it is the desire of the partners above named, and each of them, to enlarge the scope of their partnership business and activities and to amend the existing Articles of Partnership accordingly.

NOW, THEREFORE, in consideration of their mutual covenants and agreements the parties hereto, each for himself, agrees that the existing Articles of Copartnership, dated December 31, 1941, be amended to include therein the following:

1. The said partnership business will, in addition to engaging in those activities referred to in the existing partnership agreement, engage in the business of financing motion picture productions * * *.

2. The assets of the partnership are to be available in the operation of this new business activity. It being understood further that nothing herein to

the contrary withstanding, if any individual partner or partners desires to advance any sums toward the abovementioned business activity over and above the sum advanced by this partnership that the profits realized on such sums advanced by the individual partners or the partnership shall be divided as follows:

(a) Moneys advanced by individual partners over and above the sum advanced by the partnership shall be first refunded to such partner or partners individually;

(b) The profits realized from that portion of the money advanced by the partnership or by the individual partners in equal sums each to the other shall upon realization of such profits become partnership assets;

(c) The profit on such sum or sums advanced by any one or more partners over and above that advanced by the other partner or partners shall belong to the individual partner or partners so advancing any excess;

(d) The losses on such sums advanced by the partnership or the sums advanced by individual partners to the extent that such sums so advanced by the individual partners are equal to that advanced by all the other partners shall be borne by the partnership and by the partners thereof equally. The losses on any sums advanced by individual partners over and above that advanced by the other partner or partners equally shall be borne wholly by said partner or partners so advancing such excess.

3. Maurice P. Koch is hereby appointed manager of that portion of the partnership business referred to in this Amendment and any expenses he may incur by reason of the management of this branch of the said business shall be borne by the said partnership in addition to any expenses heretofore provided in the original partnership agreement.

4. As such General Manager the said Maurice P. Koch is hereby authorized to deal in his own name with any person, firm or corporation with relation to the business herein referred to. It being understood and agreed that in so dealing in his own name the said Maurice P. Koch is acting as the agent of the said partnership and the agent of the individual partners thereto and that any funds received by him, any stocks or bonds or notes or other evidences of indebtedness, any contracts or licenses he may secure in his own name as a result of the proceeds of this partnership or the individual partners shall to the extent of the advance of moneys by this partnership, or the individual partners be and remain the property of the partnership or the individual partners, notwithstanding that the same may on the written evidences of indebtedness or contracts stand in the name of Maurice P. Koch.

5. It being understood, however, in this connection that the said Maurice P. Koch will not enter into any transaction on behalf of said partnership without the consent of a majority of the partners and it being further understood that the said Maurice P. Koch is

to receive no increase in compensation for time devoted to this branch of the business.

EXECUTED by the parties hereto the day and year first above written.

Rebecca Koch
Maurice P. Koch
Harold M. Koch
William L. Koch

Appendix "C"

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Court of Appeals
for the Ninth Circuit

Harold M. Koch, Bessie Koch, William L. Koch, Rose Koch, Rebecca Koch Abel, Maurice P. Koch and Daisy Koch, Appellants, vs. United States of America, Appellee.	No. 15,645 Sept. 12,1958

Upon Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: FEE, CHAMBERS and HAMLEY, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

The members of the Koch family here involved are a copartnership entitled H. Koch & Sons, engaged in the business of the manufacture of luggage. On October 23, 1944, the partnership agreement was amended,

and in addition thereto the partnership was permitted to engage in the business of financing motion pictures through direct participation by way of loans or investment in stock. This amendment was considered necessary in order to eliminate provisions of the original agreement that the partners must devote all their time to the luggage business and could not remain away from that business for sixty days or more.

In April, 1946, a corporation, named "Beacon Pictures Corporation," was formed to engage in the production of motion pictures, but the partnership did not engage in the organization of such corporation.

H. Koch & Sons and the individuals filed income tax returns for the years 1945 and 1947. Thereafter, these returns were amended to claim a deductible loss for the year 1947[1] and a net operating loss carry-back[2] for the year 1945, claimed to arise from an alleged loss of $90,000.00 on loans made to Beacon Pictures, including an alleged loss of $15,000.00 to the same corporation, which Maurice Koch, one of the partners, and his wife claimed to be chargeable to them pursuant to the terms of the partnership agreement.

These claims for refund were denied on the ground that the loss was a non-business bad debt. The Kochs thereupon brought this action pursuant to 28 U.S.C.A. § 1346(a)(1), and demanded jury trial, which was granted.

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[1]Pursuant to §§ 23(e)(1), (2) of the Internal Revenue Code of 1939.

[2]Pursuant to § 122(b)(1) of the Internal Revenue Code of 1939.

At the close of the evidence, the government moved for a directed verdict as to all the Kochs, and also moved to amend the answer to deny that Maurice P. Koch lost $15,000.00 in addition to the $75,000.00 lost by the partnership. The latter motion was denied. A verdict was directed against Maurice P. Koch and Daisy Koch for the $15,000.00 loss which they claimed in addition to a share of the $75,000.00 partnership loss. The jury then returned a special verdict as follows:

> "During the year 1947, was H. Koch & Sons regularly engaged in the business of financing motion picture ventures? Answer: No."

This question had been submitted to the jury by stipulation in lieu of a trial by jury of all issues. Thereafter, also under the stipulation, the trial judge entered findings of fact, including the special verdict and conclusions of law. Judgment entered on this basis.

The partnership, according to the evidence, did make the loans upon which the claim of business loss was based. A check was issued to David Sebastian on April 25, 1946, in the sum of $15,000.00, of which $5,000.00 was a loan to the partnership of Sebastian and Hersch for expenses in commencing production on a picture, while the balance was a loan to David Hersch and Sam Coslow to organize and launch Beacon Pictures Corporation above mentioned. Later Hersch and Sebastian were loaned $2,500.00 for the same purpose. Sebastian and Hersch repaid the $10,000.00 loaned upon the sale of the first picture.

Beacon Pictures executed and delivered to H. Koch & Sons notes for $80,000.00, in return for two checks aggregating that amount payable to the order of Sebastian. Thereafter, H. Koch & Sons loaned $20,000.00 additional to Beacon Pictures, but this sum was repaid. Beacon Pictures made a failure of the venture on this picture, and the other loans were never repaid to the Koch partnership.

Thereafter, H. Koch & Sons engaged in negotiations for various other loans for persons and corporations engaged in motion pictures, but for one reason or another none of these later transactions fructified into loans. Another corporation, Ambassador Productions, Inc., was formed. All shares of stock therein were issued to Maurice P. Koch. Rights to the book, "Hill of the Hawk," were purchased by the corporation, but no picture was produced therefrom. Later still another corporation was formed with Maurice P. Koch as president. In the interests of this last corporation, Producers Finance Corporation, Maurice P. Koch introduced Jack Chertok, representing Apex Film Corporation, to the officers of Pacific National Bank to secure a loan for Apex. Maurice was personally a creditor of Apex, which had already been formed and had made preparations to produce films.

The record is replete with activities of Maurice P. Koch, consisting of telephone calls, conversations, discussions and airplane journeys.

It is the chief complaint of the Kochs that the trial court did not give the written contract of partnership conclusive effect. The agreement did provide that the

partnership engage in the business of financing motion picture productions, and all funds and credits of the partnership were made available for this business. It was further provided that Maurice P. Koch was to manage this part of the business in his own name as the "agent of the said partnership and the agent of the individual partners." Notwithstanding this provision, it was a question of fact whether the partnership actually engaged in the business of financing motion picture ventures in 1947.[3] The triers of the fact found they were not. The jury, irrespective of the partnership agreement, had a right to view the activities of Maurice P. Koch to determine whether he was acting individually or as a representative of one or another of the corporations or for the partnership. The partnership agreement seems to contemplate loans and other activities of the individual partners. But, in the last analysis, the question was for the jury.

The Kochs attempt to consider this action piecemeal, whereas it is a consolidated whole. The court, on the basis of the evidence and stipulations, has made findings and conclusions which cover the entire case. The fact that one of the findings, and that the crucial one, is supported by a special verdict of a jury, surely does not weaken the finding of the court on the point. If the Koch partnership were not engaged in the business of financing motion picture

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[3]"To determine whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case." Higgins vs. Commissioner, 312 U.S. 213, 218; Maloney vs. Spencer, 9 Cir., 172 F.2d 638; Towers vs. Commissioner, 2 Cir., 247 F.2d 233, cert. den., 355 U.S. 914; Commissioner vs. Stokes' Estate, 3 Cir., 200 F.2d 637.

ventures during the year 1947, the matter is concluded. They cannot then recover in this case. The jury so found. The court so found. There was substantial evidence to support either or both findings. This is true whether $75,000.00 or $90,000.00 be involved.

It makes no difference in any essential whether the $15,000.00, upon which the court directed a verdict against Maurice P. Koch and his wife, belonged to them or to the partnership. If the money belonged to Maurice, he made no claim to be in the business of financing motion pictures personally, and, if he advanced it personally through the partnership, he cannot personally claim on a ground available to the partnership. On the other hand, if he claims through the partnership or the partnership claims the benefit of the $15,000.00 as well as the $75,000.00, still both these propositions are negatived by the finding of fact by the jury that the partnership was not in the business of financing motion pictures during the period. It is true there may have been a technical flaw, but no one of the plaintiffs was materially prejudiced. Technically, the jury considered only the key question with reference to $75,000.00. But the finding would have been the same if the $90,000.00 had been before them. All the evidence was there.

In arriving at the verdict, however, the jury were entitled to a fair presentation and to correct instructions. But the points of which appellants complain are not well founded. It was not error for the court to instruct the jury that the activities of Maurice in using his own money, in his own behalf and not on behalf of H. Koch & Sons, could not be considered in

determining the ultimate question. There was testimony that Maurice had engaged in activities on his own behalf and that upon at least one occasion loaned and again collected his own money. His testimony that he was always acting for and on behalf of the partnership need not have been given full credence by the jury.

Appellants complain that the court did not instruct the jury that they might consider that the partnership might have been engaged in the business of financing motion picture ventures even if all activities and efforts actually expended in attempting to negotiate for and enter into such financial transactions were futile. The court defined business, and said that isolated transactions do not constitute a trade or business. The instructions given were clear, and the court was not bound to give those requested. Where appellant had made only one isolated loan at the outside, we do not think the jury could conclude that a number of futile transactions and activities looking toward consummation of loans had any value in determining whether the partnership was engaged in the business of financing.

The question of the propriety of the conduct of counsel for the government in argument is raised. Suffice it to say, this is a matter almost exclusively in control of the trial court. The judge is normally acquainted with counsel, and has responsibility for the fairness of the trial. We do not say that, upon a flagrant violation of ethics or of due process, we would not intervene. But no such error was present here.

Appellants offered various documents which contained no reference to them, but related to Coslow and United Artists Corporation. Another series related to Ambassador Pictures Corporation, which was an independent corporation, and third persons. Maurice testified he directed or authorized the preparation of each. But the documents did not prove anything with regard to appellants. They were properly excluded.

There is sufficient substantial evidence to sustain the verdict of the jury and the findings of the court. It need not be further reviewed. The activities of corporations and of Maurice are not necessarily attributable to the partnership. The court instructed that the acts of employees, agents and other persons, firms and corporations are, in contemplation of law, the acts of taxpayers. The jury must have found that Maurice and the corporations were not agents, or that, taking all the activities together, these did not constitute the appellants as in the business of financing motion picture ventures. There was sufficient evidence to sustain the finding on either alternative. It may be that the jury took a common sense view and refused to recognize investment, management and other forms of financing as a trade or business.[4]

Appellants also object to an instruction on the ground that the presumption that the administrative determination that the partnership was not engaged in a trade or business was given too much weight.

[4]See Towers vs. Commissioner, 2 Cir., 247 F.2d 233, cert. den., 355 U.S. 914.

Appellants admit there is such a presumption, but claim it vanishes when evidence is produced. The key words of this instruction are:

> "The burden is upon the plaintiff to overcome the presumption of the correctness of the Commissioner's determination by proving by a preponderance of evidence that they were engaged in the trade or business of financing motion pictures."

Appellants did not except to the instruction. This Court does not hold it plain error and, unexpected, we will not notice it. Rule 51(a), Federal Rules of Civil Procedure. Besides, no harm was done when the instruction is considered as a whole. The instruction did not specifically state that the presumption was to be considered as evidence, and the burden of proof of plaintiffs was correctly explained.

Affirmed.

(Endorsed:) Opinion. Filed Sept. 12, 1958.

Paul P. O'Brien, Clerk.

Appendix "D"

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ON PETITION FOR REHEARING

In the United States Court of Appeals
for the Ninth Circuit

Harold M. Koch, Bessie Koch, William L. Koch, Rose Koch, Rebecca Koch Abel, Maurice P. Koch and Daisy Koch, Appellants, vs. United States of America, Appellee.	No. 15,645

Before: FEE, CHAMBERS and HAMLEY, Circuit Judges

It is hereby ordered that the first full sentence appearing on page 3 of the opinion, which reads as follows:

> "Sebastian and Hersch repaid the $10,000.00 loaned upon the sale of the first picture."

be and the same is hereby stricken.

It is further ordered that the petition of appellants for rehearing be denied. This panel is not of the opinion that the case should be reheard en banc.

/s/ James Alger Fee
/s/ Richard H. Chambers
/s/ Frederick G. Hamley
Circuit Judges.

(Endorsed:) Filed October 27, 1958.
Paul P. O'Brien, Clerk.

Appendix "E"

United States Court of Appeals
for the Ninth Circuit

Harold M. Koch, et al., Appellants, vs. United States of America, Appellee.	No. 15,645

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment.

Filed and entered September 12, 1958.

Paul P. O'Brien, Clerk.